Decision in CPLR Article 78 proceedings - Levea, William

At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 14th day of August, 2019.

PRESENT: HON. RAYMOND J. ELLIOTT, III
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
WILLIAM LEVEA,

Petitioner,

DECISION AND ORDER
INDEX NO. 903560-19

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

ANTHONY J. ANNUCCI, Acting Commissioner, Department of Corrections and Community Supervision,

Respondent.

APPEARANCES: KATHY MANLEY, ESQ.
26 Dinmore Road
Selkirk, NY 12158
Attorney for the Petitioner

HON. LETITA JAMES
Attorney General for the State of New York
(CHRISTOPHER A. LIBERATI-CONANT, ESQ.)
Assistant Attorney General
Attorney for the Respondent

RAYMOND J. ELLIOTT, III J.S.C.

Petitioner was convicted in March 2011, of a Vehicular Homicide that took place in November 2009. In 2014, 2015, and 2016, Petitioner was denied Medical Parole release by the Parole Board (*see* Executive Law §§ 259–r; 259–s). Petitioner's health has clearly declined throughout his imprisonment. In 2016, despite the ultimate determination by the Parole Board denying release, Department of Corrections and Community Supervision wrote that "there was no medical dispute as to the merits of proceeding with Compassionate release."

In 2019, a new application for Medical Parole was initiated. Dr. John Morley, the Deputy Commissioner/Chief Medical Officer of the Division of Health Services sent a denial letter to Petitioner on behalf of Respondent stating, in relevant part, that Petitioner was "not an appropriate candidate for Medical Parole." Petitioner commenced this proceeding asserting that the determination was not supported by the record, was arbitrary and capricious and irrational bordering on impropriety.

As relevant here, Executive Law § 259-r states that "[t]he board shall have the power to release on medical parole any inmate . . . who . . . has been certified to be suffering from a terminal condition, disease or syndrome and to be so debilitated or incapacitated as to create a reasonable probability that he or she is physically or cognitively incapable of presenting any danger to society" (Executive Law § 259-r [1] [a]). The statute then commits to the board the duty to consider "whether, in light of the inmate's medical condition, there is a reasonable probability that the inmate, if released, will live and remain at liberty without violating the law, and that such release is not

incompatible with the welfare of society and will not so deprecate the seriousness of the crime as to undermine respect for the law" (Executive Law § 259-r [1] [b]). The statute then requires that a report shall be made to Respondent "includ[ing] but . . . not be limited to a description of the terminal condition, disease or syndrome suffered by the inmate, a prognosis concerning the likelihood that the inmate will not recover from such terminal condition, disease or syndrome, a description of the inmate's physical or cognitive incapacity which shall include a prediction respecting the likely duration of the incapacity, and a statement by the physician of whether the inmate is so debilitated or incapacitated as to be severely restricted in his or her ability to self-ambulate or to perform significant normal activities of daily living" (Executive Law § 259-r [2] [a]). The statute then requires Respondent or his/her "designee, shall review the diagnosis and may certify that the inmate is suffering from such terminal condition, disease or syndrome and that the inmate is so debilitated or incapacitated as to create a reasonable probability that he or she is physically or cognitively incapable of presenting any danger to society" (Executive Law § 259-r [2] [b]).

Likewise, Executive Law § 259-s applies to inmates "certified to be suffering from a significant and permanent non-terminal condition, disease or syndrome that has rendered the inmate so physically or cognitively debilitated or incapacitated as to create a reasonable probability that he or she does not present any danger to society" (Executive Law § 259-s [1] [a]). The statute then commits to the board the duty to consider" "i) the nature and seriousness of the inmate's crime; (ii) the inmate's prior criminal record; (iii) the inmate's disciplinary, behavioral and rehabilitative record during the term of his or her incarceration; (iv) the amount of time the inmate must serve before becoming eligible

for release pursuant to section two hundred fifty-nine-i of this article; (v) the current age of the inmate and his or her age at the time of the crime; (vi) the recommendations of the sentencing court, the district attorney and the victim or the victim's representative; (vii) the nature of the inmate's medical condition, disease or syndrome and the extent of medical treatment or care that the inmate will require as a result of that condition, disease or syndrome; and (viii) any other relevant factor" (Executive Law § 259-s [1] [b]). The statute then requires that a report shall be made to Respondent "includ[ing] but . . .not limited to a description of the condition, disease or syndrome suffered by the inmate, a prognosis concerning the likelihood that the inmate will not recover from such condition, disease or syndrome, a description of the inmate's physical or cognitive incapacity which shall include a prediction respecting the likely duration of the incapacity, and a statement by the physician of whether the inmate is so debilitated or incapacitated as to be severely restricted in his or her ability to self-ambulate or to perform significant normal activities of daily living" (Executive Law § 259-s [2] [a]). The statute then requires Respondent or his/her designee to review "the diagnosis and may certify that the inmate is suffering from such condition, disease or syndrome and that the inmate is so debilitated or incapacitated as to create a reasonable probability that he or she is physically or cognitively incapable of presenting any danger to society" (Executive Law § 259-s [2] [b]).

If an inmate has previously appeared before the Parole Board, a request to the Respondent for certification for medical parole release must further demonstrate that the inmate's medical condition has deteriorated since his or her last parole interview (*see*

Department of Corrections and Community Supervision Directive No. 4044 [III] [A] [3]; *Matter of Ifill v Wright*, 94 AD3d 1259, 1260 [3d Dept 2012]).

Notably "[a]ny certification by the commissioner or the commissioner's designee pursuant to [these] section[s] shall be deemed a judicial function and shall not be reviewable if done in accordance with law" (Executive Law §§ 259-r [3]; 259-s [3]).

In opposition to the Petition, Respondent submitted an affidavit stating that he had considered the required medical information as well as "prior Board determinations, and a letter in opposition to [P]etitioner's release on medical parole."

The statute commits to the Commissioner discretion assessing the inmate's capacity. This assessment may include a prior Parole Board determination regarding the probability an inmate "could be at liberty without again violating the law" (*Matter of Ifill v Wright*, 94 AD3d at 1260-1261). However, the statute commits to the Parole Board the authority to consider such information as previous crimes, the nature and seriousness of the conviction, and recommendations of the sentencing court, district attorney and victims, among several other factors (*see* Executive Law §§ 259-r [1] [b]; 259-s [1] [b]).

Here, Respondent has sworn that he considered information beyond that which is statutorily subscribed to him, potentially invading the authority given to the Parole Board.

Accordingly, the Petition is hereby **granted** and the matter is **remanded** back to Respondent for a rehearing in accordance with this Decision and Order.

Petitioner's arguments regarding *in camera* review and a potential error in the wording of Respondent's affidavit are thus rendered academic.

This shall constitute the Decision, Order and Judgment of the Court. All papers, including this Decision, Order and Judgment are being returned to the attorney for the Petitioner. All original supporting documentation is being filed with the Albany County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED

ENTER.

Dated: August 14, 2019
Albany, New York

RAYMOND J. ELLIOTT, III
Supreme Court Justice

Papers Considered:

1. Verified Petition filed June 17, 2019; Annexed Exhibits A- G
2. Respondent's Answer filed July 26, 2019; Annexed Exhibits A-D.
3. Respondent's Affidavit filed July 26, 2019.
4. Respondent's Memorandum of Law in Opposition filed July 26, 2019
5. Petitioner's Affirmation in reply filed August 6, 2019

STATE OF NEW YORK
SUPREME COURT CHAMBERS
RENSSELAER COUNTY COURTHOUSE
TROY, NEW YORK 12180
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TONI MARTIN VANDENBURG
SECRETARY TO JUDGE

RAYMOND J. ELLIOTT, III
JUSTICE

DAVID M. M. FRONK
LAW CLERK

August 14, 2019

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26 Dinmore Road
Selkirk, NY 12158

Re: Levea v. Annucci
Index No. 903560-19

Dear Counselors:

Enclosed please find the Court's original Decision and Order with regard to the above-entitled matter.

The original Decision and Order is being sent to Attorney Manley for filing with the Albany County Clerk's Office and service accordingly.

I am further returning to Attorney Liberati-Conant Exhibit "B" & "C" Confidential Material which was submitted for in camera review.

Sincerely,

Raymond J. Elliott, III
Supreme Court Justice

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